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2. The respondent exercised the power of eminent domain and under Penn-

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sylvania law only a common carrier can exercise that power.

3. Pennsylvania law gave the public the right to use these railroad facilities and such right to use the facilities makes the respondent a common carrier.

C. The General Electric Company's railroad carried merchandise belonging to others.

D. The fact that the General Electric Company did not incorporate its railroad as such should not enable it to avoid its responsibility under the Federal Employers' Liability Act.

II. The District Court and the Court of Appeals erroneously gave Res Adjudicata effect to an Interstate Commerce Commission decision in direct conflict with a previous decision by this same Court of Appeals and a decision by this Court.

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IN THE

**SUPREME COURT OF THE UNITED STATES.**

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Term No.

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WILLIAM KELLY,
*Petitioner,*

vs.

GENERAL ELECTRIC COMPANY,
*Respondent.*

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**PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SUPREME COURT OF THE UNITED STATES:

William Kelly, by his attorneys, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 24, 1953.

## OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 110 F. Supp. 4 (U. S. E. D. Pa. 1953). The opinion of the United States Court of Appeals for the Third Circuit is reported in 204 F. 2d 692 (C. A. 3, 1953).

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## JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on June 24, 1953. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A., Section 1254(1).

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## QUESTIONS PRESENTED.

1. Where a corporation owns railroad tracks and operates engines and freight cars owned by it over such tracks, and over the tracks of the Pennsylvania Railroad, hauling not only its own goods, but goods of other shippers and has safety rules for its own railroad men who operate such engines and freight cars and those who maintain the tracks, and where the corporation places such tracks over a public street in the City of Philadelphia, Commonwealth of Pennsylvania, is not such corporation in the operation of its railroad a common carrier under the Federal Employers'

Liability Act (45 U. S. C. A. 51, et seq.), so that it is responsible to a railroad worker employed by it who loses an arm and a leg as a result of the negligence of a fellow employee?

2. Where a corporation is organized and operated under the Constitution of the Commonwealth of Pennsylvania is it not bound by such Constitution, and where such Constitution makes such corporation a common carrier is it not a common carrier under the Federal Employers' Liability Act (45 U. S. C. A. 51, et seq.)?

3. Is not the decision in this case in direct conflict with the opinion of the same Court of Appeals (Third Circuit) in *Kach v. Monessen Southwestern R. R.*, 151 F. 2d 400 (C. A. 3, 1943)?

4. Is not the holding in this case a deprivation of petitioner's right to trial by jury under the Seventh Amendment to the Constitution of the United States?

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## STATUTE INVOLVED.

Federal Employers' Liability Act, Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, as amended by the Act of August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A., Sec. 51, et seq.

## STATEMENT OF FACTS.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq., to recover for amputation of plaintiff's left arm and leg and other personal injuries sustained by him when he was run down by a switch engine owned by the defendant General Electric Company on railroad tracks near the General Electric plant in Southwest Philadelphia. At the time of the accident plaintiff was paid by the General Electric Company and this action was commenced on the theory that at the time and place of the accident General Electric was engaged in Interstate Commerce as a common carrier by railroad. The General Electric Company at the time of the accident owned and operated railroad trains over its tracks at the scene of the accident. Plaintiff was, for the purpose of this argument, admittedly an employee of General Electric.

General Electric Company in this particular location owns 2.17 miles of trackage, has two engines, nine freight cars, and four box cars which are used in this area (R. 14a, 15a, 45a, 49a). These engines, cars and tracks are used not only to transport equipment owned or consigned to the General Electric Company but also carry within incoming shipments cars which have only part of their load consigned to them. *Thus, the remaining portion of the car contains goods of other consignees* (R. 96a, 113a). Most of the material shipped from the General Electric plant is shipped F. O. B. their plant (109a, 110a, 111a). The locomotives of the General Electric Company's railroad moved on the tracks of the Pennsylvania Railroad and pulled cars from the tracks of this admitted common carrier to various places in their plant (R. 103a). In addition, the railroad of the General Electric Company operates under a pre-

scribed set of rules of safety promulgated by persons familiar with railroad work (R. 123a).

The petitioner also produced evidence that under an agreement between the General Electric Company and the Pennsylvania Railroad dated May 14, 1925, paragraph third (R. 133a), the General Electric Company in the operation of its railroad agreed to conform, as a railroad must, with the requirements of the rules and regulations of the Interstate Commerce Commission with respect to the construction, maintenance and operation of the subject tracks.

The General Electric Company also was permitted to construct its railroad across the city streets in the City of Philadelphia. This it could not do under Pennsylvania law unless it was a common carrier.

This matter comes before your Honorable Court when under these facts the District Court held that the respondent was not a common carrier and hence was entitled to summary judgment. The Court of Appeals for the Third Circuit affirmed such entry of judgment.

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## SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respect:

In holding as a matter of law that the General Electric Company's railroad was not a common carrier within the meaning of the Federal Employers' Liability Act (45 U. S. C. A. 51).

## REASONS URGED FOR GRANTING THE WRIT.

1. The United States Court of Appeals (Third Circuit) erroneously interpreted the meaning of the words "common carrier" in the Federal Employers' Liability Act (45 U. S. C. A. 51, et seq.).

2. The United States Court of Appeals, and the District Court for the Eastern District of Pennsylvania ignored the Constitution of the Commonwealth of Pennsylvania.

3. The decision is in conflict with the decision of the same Court of Appeals in *Kach v. Monessen Southwestern Ry.*, 151 F. 2d 400 (C. A. 3, 1943).

4. Petitioner by the decision of the Court of Appeals has been deprived of his right to a trial by jury under the Seventh Amendment to the Constitution of the United States.

5. No case of this Court has previously stated the factors necessary to make a railroad a "common carrier" within the provision of the Federal Employers' Liability Act (45 U. S. C. A. 51).

## ARGUMENT.

### I. UNDER THE CIRCUMSTANCES HERE INVOLVED THE GENERAL ELECTRIC COMPANY IS AS A MATTER OF LAW A "COMMON CARRIER" BY RAILROAD.

#### A. The General Electric Company operates a railroad.

There can be no doubt of the fact that the General Electric Company operates a railroad. That much had to be and was admitted by the respondent. It was forced to admit this because it owns at this location alone 2.17 miles of tracks; it owns and operates engines, freight cars and box cars over these tracks; the engineers, brakemen, flagmen, conductors and maintenance men which it employs are subject to specific safety rules prescribed by persons familiar with railroad activity. Faced with these factual circumstances, there is not and could not be any dispute that the respondent operated a railroad.

It is with specific reference to this railroad that the petitioner contends that the General Electric Company is a common carrier by railroad. Petitioner is *not contending* that the General Electric Company with all of its vast resources and operations is a common carrier. But, petitioner *is respectfully insisting that in its railroad operations* the General Electric Company is a common carrier.

In deciding this question the name of the respondent means nothing. The Pennsylvania Railroad would remain a common carrier even if its name should be changed to the Pennsylvania Electric Company. Therefore, the fact that the name of the respondent is the General Electric

Company is irrelevant to any consideration of its status as a common carrier.

**B. The status of the respondent as a common carrier is to be determined by Pennsylvania law and under such law the respondent is a common carrier.**

The case of *North Carolina Ry. Co. v. Zachary*, 232 U. S. 248 (1913), establishes the rule that the law of the place where the accident occurred governs the status of the defendant in Federal Employers' Liability cases. In that case this Court referred to North Carolina law and said (p. 258):

> "This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between states' and that the deceased was 'employed by such carrier in such commerce' within the meaning of the Federal act * * *."

See also *Stevenson v. Lake Terminal Ry. Co.*, 42 F. 2d 357 (C. C. A. 6th, 1930), where the Court at pages 359, 360 said:

> "Plaintiff also relies upon several sections of the Ohio General Code to support his contention that defendant was without authority to lease any of its equipment to a private corporation, and that therefore the leasing of defendant's engine and tracks was void and illegal for all purposes. Section 8684 of the Ohio General Code does prohibit the employment of corporate equipment 'for any other purpose than to accomplish the legitimate objects of its creation', but we cannot agree that this general stricture prevents, as 'illegal', the accommodation hiring out of an engine, not then employed by the railroad, or the granting of such per-

mission for the use of its tracks, as is here involved. Moreover, even an illegal lease of the equipment does not of itself make plaintiff pro hac vice the servant of the lessor. See Standard Oil Company v. Anderson, 212 U. S. 215, 221, 29 S. Ct. 252, 53 L. Ed. 480. *The lessor becomes liable only if the local law holds it responsible for the negligence of its lessee.* Cf. North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159." (Emphasis supplied.)

Let us turn to Pennsylvania law.

1. *The Constitution of the Commonwealth of Pennsylvania makes the respondent a common carrier.*

The Constitution of the Commonwealth of Pennsylvania provides, Art. 17, Section 1:

> "All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers * * *."

This clear and unambiguous provision in the Constitution of the Commonwealth where the accident happened and where the defendant was incorporated was completely ignored by the District Court whose decision was affirmed Per Curiam by the Court of Appeals. It is respectfully submitted that the provisions of this Constitution make unanswerable the argument that the respondent was a common carrier by railroad as a matter of law.

The respondent operated a railroad. The Constitution of the state where the accident happened and where the respondent was incorporated makes *all* railroad companies common carriers; ergo, the respondent must, by engaging in railroading, undertake the obligations of a common carrier. Nothing could be clearer. Nothing could be more conclusive. Under the Constitution of this Commonwealth the respondent *must be a common carrier.*

2. *The respondent exercised the power of eminent domain and under Pennsylvania law only a common carrier can exercise that power.*

By the exercise of this power Pennsylvania law places the respondent in this case in a position where it cannot deny that it is a common carrier. Before the construction of the railroad tracks where this accident occurred, the Pennsylvania Railroad was given the right to lay the tracks across 68th Street—a public highway in the City of Philadelphia. The Pennsylvania railroad in turn, by lease gave this right to the General Electric Company. In constructing the railroad across the city street the General Electric Company was acting unlawfully unless it was a common carrier: *Barker, et al. v. Hartman Steel Co.*, 129 Pa. 551 (1889). Indeed, the legislature could not allow a private industrial corporation to encroach upon the public streets as such would be a taking of property for a private rather than a public purpose. *Ormsby Land Co. v. Pittsburgh*, 276 Pa. 68 (1923). Thus, the only type of corporation which can perform such act is a common carrier which has the power of eminent domain and which takes the property for a public purpose.

Following the effect of this situation through to its logical conclusion another proposition of law, not mentioned and not discussed by the District Court or the Court of Appeals, (although vigorously asserted by your petitioner), fits the factual circumstances and precludes the defendant from asserting that it was not operating as a common carrier. That proposition is: *If specific conduct, in one view, may be construed to be lawful, and in another to be unlawful, the lawful construction shall be adopted.* The force of this proposition is best illustrated by the Pennsylvania case of *Kissell v. Motor Age Transit Lines*, 357 Pa. 204 (1947). In that case a tractor-trailer was being driven along a highway and was involved in an accident. The only person holding an Inter-

state Commerce Commission permit was the owner of the trailer. The owner of the trailer attempted to assert that the owner of the tractor was an independent contractor. The court said that if such was so, the shipment was being made illegally and that in view of the above stated presumption of lawfulness such contention *could not be made. The court decided as a matter of law that the owner of the tractor was the agent of the owner of the trailer.* See also *Rosu v. Law,* 193 F. 2d 894, 899 (C. A. 3, 1952).

Applying the same reasoning to this case, General Electric Company constructed its railroad over a public highway. The only way that such action could be taken lawfully was if General Electric Company was a common carrier. It cannot now assert that it performed an illegal act and that it was not a common carrier.

3. *Pennsylvania law gave the public the right to use these railroad facilities and such right to use the facilities makes the respondent a common carrier.*

In *United States v. Louisiana & P. R. Co.,* 234 U. S. 1, 24, 34 S. Ct. 741, 746 (1913), where that Court said:

> "* * * The extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts."

With this as the basic test the question becomes, can the public use the railroad facilities owned by the General Electric Company. The answer is clearly in the affirmative. Article 17, Sec. 1, of the Constitution of the Commonwealth of Pennsylvania, provides:

"All railroads and canals shall be public highways and all railroad and canal companies shall be common carriers * * *."

In *Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, et al.*, 133 Pa. Superior Ct. 67 (1938), a mining company constructed a sidetrack connecting with the Pennsylvania Railroad. The Court held that such sidetrack was impressed with a public use. The Court said (p. 73):

"* * * The sidetrack which appellant built, when connected with the Pennsylvania railroad, constituted a part of the railroad's transportation facilities in the same manner *as if constructed by the railroad company itself.* The railroad's right of way and tracks are its private property, but subject to public use. Pennsylvania Railroad Co. v. Public Service Commission, 64 Pa. Superior Ct. 586, 589. *If some of these facilities constituting its transportation system are privately owned, they are none the less charged with public use, and subject to regulation by the state.* Sidetracks are among the works and appendages usual in the convenient operation of a railroad (Reeser v. Philadelphia & Reading Railway Co., 215 Pa. 136, 138, 64 A. 376); they are facilities of such utility, even though privately owned; when connected with the line of the railroad company they are an integral part of the railroad system, regardless of ownership, and, as provided by Artice 17, §1, of the Constitution of 1874, become public highways, and hence subject to regulation as such by the state." (Emphasis supplied.)

The people who own the property all along 68th Street (see Exhibit A, sheet 7) (138a) all have a right under the above provisions of the Constitution and the *Lehigh Nav. Coal Co.* case, supra, to tie into and use these facilities.

The District Court attempted to make a distinction between the tracks and other facilities but the fact remains

that all of the facilities become subject to a public use. It is not only the tracks which become subject to the public use, but all of the facilities owned by the company which are used in the operation of the railroad.

**C. The General Electric Company's railroad carried merchandise belonging to others.**

The engines, cars and tracks of the General Electric Company's railroad not only transported General Electric Company goods but also the goods of others. First, with respect to outgoing shipments, *all* of the goods shipped by them were the goods of others at the time they were shipped. All of the outgoing shipments were made F. O. B., the plant of the respondent. Thus, title to such goods passed to the buyers at the time of such shipment. Uniform Sales Act, §46; Act of May 19, 1915, P. L. 543, §6; (69 P. S., §256); *New York and Pennsylvania Co. v. Cunard Coal Co.*, 286 Pa. 72 (1926); *W. C. Downey & Co., Inc. v. Kraemer Hosiery Co.*, 136 Pa. Superior Ct. 553 (1941). These goods were therefore the property of *others* being transported by the employees of the respondent over its tracks by its engines, in its cars. Whether it charged for such service is irrelevant to the issue.

Indeed, the respondent transported some goods which it never owned, for in some instances cars come over the General Electric tracks which have only a portion of their load consigned to the respondent. The other half belongs to some other consignee. So far as these goods are concerned they are, when they come in, the goods of others and they remain the goods of others when they come out. They never belong to the General Electric Company.

As a matter of fact this shipping of other persons' goods was an element lacking in the case of *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C. A. 3, 1945), and nonetheless this same Court of Appeals held the defendant

to be responsible under the Federal Employers' Liability Act. The Court said (p. 401):

> "The evidence discloses that the defendant receives cars loaded with raw materials consigned to the Steel Company from the two connecting railroads and places them at the appropriate points in the works of the Steel Company. It also receives from the Steel Company cars loaded with the manufactured product of that company and moves them from the points of loading to points of connection with the connecting railroads. The defendant, however, does not publish tariffs of any kind, does not issue bills of lading, its name does not appear on any of the bills of lading covering the inbound shipments received from the connecting railroads and it does not participate in any of the freight rates covering the materials transported by those railroads."

It is extremely significant to note the striking similarity between the facts of that case and the facts of this case. And yet in the *Kach* case this same Court of Appeals decided that the Monessen Southwestern Ry. Co. (a wholly owned steel company railroad) was subject to the Federal Employers' Liability Act, while in this case it decided that General Electric Company, by failing to incorporate its railroad, could dodge the responsibility of this Federal act. The respondent here should be made responsible under the Federal Employers' Liability Act just as the Conemaugh & Black Lick R. R. which operates on behalf of the Bethlehem Steel Company and, the Monessen Southwestern Ry. Co. which operated on behalf of the Pittsburgh Steel Company must bear their obligations under the Federal Employers' Liability Act.

It is true that in the *Kach* case the railroad there involved admitted that it was a common carrier, but implicit in that decision must be a holding that it was a common carrier. The Federal Court could only have had jurisdiction by

virtue of the Federal Employers' Liability Act. There was no diversity of citizenship and a defendant cannot admit Federal jurisdiction. See *City of Indianapolis v. Chase National Banks*, 314 U. S. 63 (1941).

In addition thereto, there was an argument made that the defendant was a mere plant facility rather than a common carrier for the Court said in the *Kach* case, page 402:

> "The defendant points out that before a railroad may lawfully operate in interstate commerce it first must obtain a certificate of public convenience and necessity from the Interstate Commerce Commission. It states that the Commission has refused it such a certificate and *has held it to be a mere plant facility of the Steel Company.*" (Emphasis ours.)

Thus, the Court in the *Kach* case clearly rejected the argument that the defendant was a *mere plant facility* and held it to be subject to the Federal Employers' Liability Act. This is precisely the argument now raised by General Electric.

**D. The fact that the General Electric Company did not incorporate its railroad as such, should not enable it to avoid its responsibility under the Federal Employers' Liability Act.**

The only distinction between the instant case and the *Kach* case is that the Monessen Southwestern Ry. Co. which hauls material for its parent, the Pittsburgh Steel Company, is separately incorporated as a railroad.

The fact that a railroad has been incorporated as such is absolutely irrelevant when the question is whether it is a common carrier. This Court has specifically rejected the corporate character of a transportation agency as a factor in determining whether it is a common carrier. In *U. S. v.*

*State of California*, 297 U. S. 175 (1936), this Court held that the State of California was a common carrier by railroad under the Federal Safety Appliance Act. The Court said (p. 181):

> "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does * * *."

In this same case the court said (p. 185):

> "The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. *No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.*" (Emphasis ours.)

A pertinent paraphrase of this language extremely applicable to this case would be:

> "The danger to be apprehended is as great and commerce may be equally impeded whether the negligence appears on a railroad which is incorporated as a railroad or on a railroad which is not so incorporated. No convincing reason can be advanced why interstate commerce and persons concerned with it should not receive the protection of the Act whenever a non-incorporated railroad as well as an incorporated railroad brings itself within the sweep of the statute, or why its all embracing language should not be deemed to afford that protection."

## II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRONEOUSLY GAVE RES ADJUDICATA EFFECT TO AN INTERSTATE COMMERCE COMMISSION DECISION IN DIRECT CONFLICT WITH A PREVIOUS DECISION BY THIS SAME COURT OF APPEALS AND A DECISION BY THIS COURT.

Another important aspect of this case is the treatment of the District Court (adopted by the Court of Appeals) of the decision of the Interstate Commerce Commission in *General Electric v. New York Central & Hudson River Railroad*, 14 I. C. C. 237. The District Court relied upon and held to be all determinative this decision by the Interstate Commerce Commission. The District Court said:

> "All these factors were considered in an application by General Electric Company to the I. C. C. to obtain a rate allowance from a rail common carrier for performing at General Electric Company's Schenectady plant the same type services here performed. General Electric Company v. New York Central & Hudson River Railroad, 14 I. C. C. 237. The Commission there held the defendant's operation to be merely that of a plant facility and not that of a common carrier, and that the General Electric Company was not entitled to a rate allowance for the use of said facilities. That decision was cited with approval by the Supreme Court of the United States in U. S. v. Louisiana & P. R. Co., supra, in pointing out the distinction between plant facilities and spur lines of a common carrier."

The Court of Appeals said:

> "We find ourselves in complete agreement with the view expressed in the able and competent opinion filed by Judge Clary in the District Court, 110 F. Supp. 4, to which we need add nothing."

Yet this same Circuit Court, in an opinion written by one of the same members who sat upon this case, in *Kach v. Monessen Southwestern Ry. Co.*, supra, said with regard to the effect of Interstate Commerce Commissions' decisions (p. 402):

> "The defendant points out that before a railroad may lawfully operate in interstate commerce it first must obtain a certificate of public convenience and necessity from the Interstate Commerce Commission. It states that the Commission has refused it such a certificate and *has held it to be a mere plant facility of the Steel Company.* The defendant urges that these determinations by the Commission are binding upon us and establish that the defendant is not engaged in interstate commerce. It is *unnecessary for us to consider the nature or extent of these determinations by the Commission, however, for we cannot agree that they control the disposition of the case now before us.* The plaintiff was not a party to them. He is entitled to a judicial determination of the question whether the defendant is engaged in interstate commerce within the meaning of the acts upon which he relies without regard to what the Interstate Commerce Commission may have determined in a proceeding of a different nature brought under other statutes." (Emphasis supplied.)

These two opinions by the same Court of Appeals are directly and diametrically opposed to one another. In this case against the General Electric Company the decision of the Interstate Commerce Commission regarding a railroad of the respondent *far removed from the site of the railroad here involved* is given *res adjudicata* effect. While previously this same Court held a decision by the Interstate Commerce Commission involving *the same railroad as was involved in that case* to be *"unnecessary for [the court] to consider"*. (Emphasis ours.)

It is respectfully submitted that this conflict in the deci-

sions of the same Court of Appeals is sufficient to allow certiorari. Indeed, it is evident from a previous decision by this Court that the treatment given the Interstate Commerce Commission decision in the *Kach* case is correct.

This Court has characterized decisions of the Interstate Commerce Commission as being of "negligible value" in interpreting the Federal Employers' Liability Act. In *Washington Railway & Electric Co. v. Scala*, 244 U. S. 630 (1916), this Court said (page 638):

> "It is argued that under the decision in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, the railway of the defendant was a street railroad, and that therefore the defendant was not a 'common carrier by railroad' within the terms of the Act of 1908 as amended. That case dealt with a purely street railway in the streets of two cities, and the decision was that it was not a 'railroad' such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Commission Act of 1887 [24 Stat. at L. 379, Chap. 104, Comp. Stat. 1916, §8563]. *The case is of negligible value in determining either the construction of the act we are considering in this case,* or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the Federal Employers' Liability Act, * * *." (Emphasis ours.)

This line of reasoning is extremely cogent. For the Interstate Commerce Act regulating carriers performs an entirely different function from that of the Federal Employers' Liability Act. Its function is to regulate among many other things the rates to be charged by railroads. The purpose of the Federal Employers' Liability Act is to protect railroad workers from the hazards of their industry. *Wilkerson*

*v. McCarthy*, 336 U. S. 53, 68 (1949), where Mr. Justice Douglas said:

> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work'."

This fundamental error in the effect given to an Interstate Commerce Commission decision is important. The words "common carrier" in the Federal Employers' Liability Act *have never been interpreted by this Court.* Certiorari should be allowed to correct this important error and to decide what factors make a railroad a "common carrier" and thus subject to regulation by this important Act of Congress designed to protect railroad workers.

## III. PETITIONER BY THE SUMMARY ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS HAS BEEN DEPRIVED OF HIS RIGHT TO TRIAL BY JURY.

This Court has consistently upheld the right of railroad workers to a trial by jury on all phases of the Federal Employers' Liability Act. In *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600 (1945), Mr. Justice Black said *on the issue of negligence*, p. 602:

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of relief which Congress has afforded them'. Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 354."

*On the issue of causation*, Mr. Justice Murphy said in *Lavender v. Kurn*, 327 U. S. 645, 652, 653 (1946):

> "* * * The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

*On the issue of the effect of a release*, again Mr. Justice Black said:

> " 'The right to trial by jury is a "basic and fundamental feature of our system of federal jurisprudence" '; * * * That it is a 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act'."

*Dice v. Akron C. & Y. R. R.*, 342 U. S. 359, 363 (1952). See also *Myers v. Reading Co.*, 331 U. S. 477, 485, 486 (1947), which upheld the right of injured railroad workers to trial by jury with reference to the Safety Appliance Act.

Petitioner has stated in that portion of the argument contending that the respondent is a common carrier as a matter of law all of the relevant facts and law. Respondent has so far avoided responsibility under the Federal Employers' Liability Act by failing to incorporate its railroad as a separate entity, but whatever may be the effect of that guise as a matter of law—and we vigorously insist that it should not affect the status of the General Electric Company's railroad as a common carrier—the issue at the least is a doubtful one and, under the above cited law of this Court, such issue must *at least* be submitted to a jury.

All that your petitioner is asking in this phase of the argument is that this Court promulgate the same rule with respect to a jury trial on the issue of whether the respondent is a common carrier as dictated in the above cases on all other issues involved in the Federal Employers' Liability Act. A consistent application of that rule relating to trial by jury requires a reversal of the decision of the Court of Appeals for the Third Circuit in this case.

## CONCLUSION.

Under the facts and law, the General Electric Company, in the operation of its railroad was a common carrier. The operations which it performed were distinctly in the nature of the operations performed by a common carrier. In holding that it was not a common carrier, the District Court and the Court of Appeals ignored the specific provision of the Constitution of the Commonwealth of Pennsylvania which makes *all* railroads common carriers. In so holding the District Court and the Court of Appeals gave *res adjudicata* effect to the Interstate Commerce Commission deci-

sion which involved a railroad owned by the General Electric Company in New York rather than the railroad here involved. In deciding in this manner the District Court and the Court of Appeals have handed down a decision in direct conflict with its own decision in *Kach v. Monessen Southwestern R. R. Co.*, supra.

By virtue of these mistakes the petitioner, by the summary action of both the District Court and the Court of Appeals, has been deprived of his right to trial by jury—a right which this Court has consistently upheld on all phases of the Federal Employers' Liability Act.

A writ of certiorari should be granted and the holding of the court below should be reversed.

Respectfully submitted,

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